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3 **UNITED STATES DISTRICT COURT**
4 **DISTRICT OF NEVADA**

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6 JASMINE A. EASLEY,

7 Plaintiff,

8 v.

9 AMERIPRISE FINANCIAL,
INC., et al.,

10 Defendants.
11

Case No. 2:19-cv-02214-APG-BNW

**ORDER AND REPORT AND
RECOMMENDATION**

12 Presently before the Court is Plaintiff Jasmine A. Easley's ("Easley's") motion to amend
13 ("Easley's Motion"). ECF No. 23. For the reasons discussed below, the Court will grant
14 Plaintiff's motion in part and recommend that it be denied in part.

15 **I. Background**

16 This case centers around Easley's allegation that Ameriprise Financial Services, Inc.
17 ("Ameriprise") wrongfully terminated her employment for reasons related to her disability. ECF
18 No. 29 at 2.

19 Easley timely filed her motion to amend. ECF No. 23; *see* ECF No. 15 at 2. Easley seeks
20 leave to add a claim for intentional interference with prospective economic advantage and will
21 drop her claim for failure to accommodate brought under the ADA. ECF No. 23.

22 Easley alleges that Ameriprise intentionally reported false information to the Financial
23 Industry Regulation Authority ("FINRA") on a required form, stating that the company fired
24 Easley for violating a final behavioral warning. ECF No. 23 at 4. Easley alleges Ameriprise's this
25 was pretextual because Easley properly notified Ameriprise that she was leaving work to visit a
26 doctor, approved through her intermittent FMLA leave. *Id.* Easley alleges that this disclosure
27 prevented her from securing future employment. *Id.* Before termination, Easley alleges her
28 manager confronted her about a conversation she had with another employee and mocked her for

1 her disabilities. *Id.* at 3. Easley also alleges that her manager tried to make her watch a video
2 about adult-aged triplets that suffered from some of the same mental health issues Easley suffers
3 from, one of which committed suicide in the video. *Id.*

4 Ameriprise filed a partial opposition to Plaintiff's motion to amend ("Ameriprise's
5 Opposition"), arguing that Easley's new claim would be futile. ECF No. 26. And subsequently,
6 Easley filed a reply ("Easley's Reply"). ECF No. 29.

7 **II. DISCUSSION**

8 Generally, a party may amend its pleading once "as a matter of course" within twenty-one
9 days of serving it, or within twenty-one days after service of a responsive pleading or motion
10 under Rule 12(b), (e), or (f). Fed. R. Civ. P. 15(a)(1). Otherwise, "a party may amend its pleading
11 only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2).
12 "The court should freely give leave when justice so requires." *Id.* "The court considers five
13 factors [under Rule 15] in assessing the propriety of leave to amend—bad faith, undue delay,
14 prejudice to the opposing party, the futility of amendment, and whether the plaintiff has
15 previously amended the complaint." *United States v. Corinthian Colls.*, 655 F.3d 984, 995 (9th
16 Cir. 2011). "The standard for granting leave to amend is generous." *Id.*

17 **A. Easley's Motion**

18 Here, Easley argues the Court should grant her leave to amend her complaint to add a
19 claim for intentional interference with prospective economic advantage. ECF No. 23. Easley's
20 motion addresses the factors courts consider when assessing the propriety of granting leave to
21 amend. ECF No. 23 at 5-7.

22 First, Easley argues that amendment would not cause undue delay: she timely filed her
23 motion to amend and only recently learned of Ameriprise's inaccurate disclosure during
24 negotiations with a potential employer. *Id.* at 5.

25 Second, Easley argues that she is not acting in bad faith or with a dilatory motive. *Id.* at 6.
26 Easley is conforming the pleading to the facts as recently discovered; she is not seeking to add
27 parties that were uninvolved or disinterested, and the additional cause of action is a foreseeable
28 consequence of Ameriprise's improper reporting of the basis of her termination. *Id.*

1 Third, Easley argues that she has not repeatedly failed to cure deficiencies by previous
2 amendments, because this is Easley's first request for leave to amend. *Id.*

3 Fourth, Easley argues that her amendment would not cause any undue prejudice to
4 Ameriprise. *Id.* at 6-7. Easley is not seeking to add additional parties. *Id.* Ameriprise will have
5 sufficient time to complete discovery by the cut-off date. *Id.* And if Easley is permitted to add the
6 claim, Ameriprise will continue the same investigation of Easley's claims. *Id.*

7 Fifth, the amendment is not futile. *Id.* at 7. The single additional claim Easley seeks to
8 bring is relevant, necessary, and would allow full compensation for her loss. *Id.*

9 And sixth, Easley's proposed amended complaint will bring clarity to her claims by
10 breaking up several causes of action brought under the ADA. *Id.*

11 **B. Ameriprise's Opposition**

12 Ameriprise argues that the Court should deny Easley's request to add a claim for
13 intentional interference with prospective economic advantage but does not oppose Easley
14 amending her claims brought under the ADA. ECF No. 26 at 1, 5.

15 Ameriprise argues that Easley's claim for intentional interference with prospective
16 economic advantage would be futile because it is based "merely on a recitation of elements and
17 speculation of fact." ECF No. 26 at 5-6. More specifically, its overarching argument is that it
18 cannot be held liable for making a required disclosure to FINRA even if Easley disagrees with the
19 termination or contends that it was discriminatory. *Id.* at 3.

20 Ameriprise argues that when a party opposes a motion as futile, the standard of review is
21 whether the claim meets the threshold under Rule 12(b)(6) for failure to state a claim. ECF No. 26
22 at 5; *See Farina v. Compuware Corp.*, 256 F. Supp.2d 1033, 1061 (D. Ariz. 2003) (citing *Miller*
23 *v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988)). Accordingly, to state a claim for
24 intentional interference with prospective economic advantage, Ameriprise argues that Easley
25 must allege facts showing: (1) a prospective contractual relationship between plaintiff and a third
26 party; (2) defendant's knowledge of the prospective relationship; (3) intent to harm the plaintiff
27 by preventing the relationship; (4) the absence of privilege or justification by defendant; and (5)
28

1 actual harm to plaintiff as a result of defendant's conduct. ECF No. 26 at 6; *Leavitt v. Leisure*
2 *Sports Inc.*, 103 Nev. 81, 88 (1987).

3 Ameriprise first argues that Easley does not meet the second element of the claim because
4 she does not allege facts to show that Ameriprise knew of Easley's employment opportunities.
5 ECF No. 26 at 4.

6 Ameriprise next argues that Easley does not meet the third element of the claim because
7 she "makes the speculative and conclusory assertion that [Ameriprise] intended to cause [Easley]
8 harm by 'falsely' reporting the nature of her termination to FINRA." *Id.* at 4.

9 Ameriprise argues Easley has not met the fourth element of the claim because Ameriprise
10 had absolute privilege and was "required by law" to disclose the reason for terminating Easley to
11 FINRA. ECF No. 26 at 5-7 (*citing Cucinotta v. Deloitte & Touche, L.L.P.*, 129 Nev. 322, 327
12 (2013) (holding that an accounting firm had absolute privileged to disclose defamatory
13 information made pursuant to federal securities law)).

14 **C. Easley's Reply**

15 Easley argues that Ameriprise's arguments fail. ECF No. 29 at 2. Easley argues that she
16 meets the first element of intentional interference with prospective economic advantage by
17 attaching exhibits of email correspondence with potential employers. ECF Nos. 29-2, 29-3.
18 Easley argues that she meets the second element because Ameriprise knew or should have known
19 Easley would seek future employment upon termination. ECF No. 29 at 4. Easley does not
20 directly address the third element but argues that Ameriprise intentionally reported incorrect
21 information to FINRA, and that disclosure precluded her from obtaining future employment. *Id.*
22 at 2.

23 Easley next addresses the fourth element, arguing that Ameriprise does not have a legal
24 obligation to wrongfully terminate her and report false information to FINRA. *Id.* Easley argues
25 that disclosure of non-securities related misconduct to FINRA is not absolutely privileged. *Id.* at
26 6-8. Easley argues that Nevada has not explicitly addressed whether financial firms have absolute
27 privilege or qualified privilege concerning statements made on Form U-5. *Id.* at 6. Easley argues
28 that *Cucinotta*, the case cited by Ameriprise to assert absolute privilege, is distinguishable

1 because it involved an accounting firm disclosing what it believed to be illegal securities
2 misconduct. ECF No. 29 at 7; 129 Nev. at 323-24. And here, Ameriprise, an investment firm,
3 disclosed conduct unrelated to securities misconduct, fraud, or dishonesty. ECF No. 29 at 7.
4 Reporting this information to FINRA, Easley argues, does not serve the public interest. *Id.* Easley
5 contends that the Court should adopt the position that disclosure of non-securities related
6 misconduct to FINRA is not absolutely privileged. *Id.* at 7-8; *Tilkey v. Allstate Ins. Co.*, 261 Cal.
7 Rptr. 3d 435, 453 (Ct. App. 2020), *reh'g denied* (May 7, 2020), *order vacated* (May 27, 2020),
8 *reh'g granted, opinion not citeable* (May 27, 2020).

9 **D. Analysis**

10 The Court will grant Easley's motion in part and recommend that it be denied in part. The
11 Court will grant Easley's motion to the extent she seeks to amend her ADA claims, as Ameriprise
12 does not oppose this. ECF No. 26 at 1. The Court will recommend that her motion be denied to
13 the extent she attempts to add a claim for intentional interference with prospective economic
14 advantage.

15 Defendant has not argued, and the Court does not find that bad faith, undue delay, or
16 prejudice to the opposing party exist here. *See* ECF No. 23 at 6-7. Also, Easley has not previously
17 amended her Complaint. *See id.* at 6. However, the Court finds that Easley's amendment to add a
18 claim for intentional interference with prospective economic advantage would be futile, as
19 discussed below.

20 "A proposed amended complaint is futile if it would be immediately 'subject to
21 dismissal.'" *Nordyke v. King*, 644 F.3d 776, 788 n.12 (9th Cir. 2011). Accordingly, the Court will
22 apply the standard articulated in *Twombly* and *Iqbal*. *Nordyke*, 644 F.3d at 788 n.12 ("the proper
23 test to be applied when determining the legal sufficiency of a proposed amendment is identical to
24 the one used when considering the sufficiency of a pleading challenged under Rule 12(b)(6)");
25 *see Fulton v. Advantage Sales & Mktg., LLC*, No. 3:11-CV-01050-MO, 2012 WL 5182805, at *3
26 (D. Or. Oct. 18, 2012) (applying the *Twombly* and *Iqbal* standard to motion to amend opposed as
27 futile).

1 Easley's pleadings must "contain sufficient factual matter, accepted as true, to state a
2 claim for relief that is plausible on its face." *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).
3 Although the standard under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff
4 must provide more than mere labels and conclusions. *Bell Atlantic Corp. v. Twombly*, 550 U.S.
5 544, 555 (2007). A formulaic recitation of the elements of a cause of action is insufficient. *Id.*

6 To state a claim for intentional interference with prospective economic advantage, Easley
7 must show (1) a prospective contractual relationship between plaintiff and a third party; (2)
8 Defendant's knowledge of the prospective relationship; (3) intent to harm the plaintiff by
9 preventing the relationship; (4) the absence of privilege or justification by defendant; and (5)
10 actual harm to plaintiff as a result of defendant's conduct. *Leisure Sports Inc.*, 103 Nev. at 88.

11 The Court finds that Easley cannot show that Ameriprise's statement was not privileged
12 and thus cannot state a claim for interference with prospective economic advantage. *See id.* The
13 parties dispute whether Ameriprise had an absolute privilege to disclose the reason she was
14 terminated. ECF Nos. 26 at 6-7, 29 at 5-8. Ameriprise contends that it had an absolute privilege to
15 disclose this information, citing *Cucinotta v. Deloitte & Touche, L.L.P.*, 129 Nev. 322, 327
16 (2013) (holding that an accounting firm had absolute privileged to disclose defamatory
17 information made pursuant to federal securities law). Plaintiff disagrees, citing *Tilkey v. Allstate*
18 *Ins. Co.*, 261 Cal. Rptr. 3d 435, 453 (Ct. App. 2020), *reh'g denied* (May 7, 2020), *order vacated*
19 (May 27, 2020), *reh'g granted, opinion not citeable* (May 27, 2020) (privilege for fraud-and-
20 securities-related information required by FINRA did not extend to reasons for termination on
21 Form U5 that were unrelated to securities issues).

22 Here, the Court applies Nevada law to determine whether Ameriprise's statements were
23 privileged. In *Cucinotta*, the Nevada Supreme Court held that "those who are required by law to
24 publish defamatory statements should be absolutely privileged in making such statements." 129

1 Nev. at 326. Still, it required that “(1) the communications be made pursuant to a lawful process,
2 and (2) the communications be made to a qualified person.” *Id.* Here, there is no dispute that the
3 communications were made under FINRA and to a qualified person. ECF Nos. 26 at 2-3, 29 at 5.
4 Accordingly, the Court finds that Ameriprise’s statements were absolutely privileged. *See*
5 *Cucinotta*, 129 Nev. at 326.

6 The Court considered whether *Cucinotta* is distinguishable from the facts of this case but
7 finds that it is not distinguishable in a way that changes the Court’s conclusion. In *Cucinotta*, it
8 was not clear that the defendant reported information it knew to be false. 129 Nev. at 323-24.
9 Here, by contrast, Easley alleges that Defendant reported information it knew to be false. ECF
10 No. 29 at 2. Even assuming Easley’s allegations are true, as the Court must, the Court finds that
11 this is not a relevant fact upon which to distinguish this case from *Cucinotta*. This is so because,
12 in *Cucinotta*, the Nevada Supreme Court explicitly considered that the absolute privilege it
13 created could be abused but created it despite this risk. 129 Nev. at 325. The court reasoned that
14 “[c]ertain communications, although defamatory, should not serve as a basis for liability in a
15 defamation action and are entitled to an absolute privilege because ‘the public interest in having
16 people speak freely outweighs the risk that individuals will occasionally abuse the privilege by
17 making false and malicious statements.’” *Id.* Accordingly, the Nevada Supreme Court implicitly
18 acknowledged that the absolute privilege it created would occasionally protect false statements
19 (but still, it did not condition the privilege on the defendant knowing the statement to be true or at
20 least not false). *Id.* As such, the Court believes that if the Nevada Supreme Court were presented
21 with the facts of this case, it would find Ameriprise’s statements to be absolutely privileged. *Id.*
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1 **III. CONCLUSION**

2 IT IS THEREFORE ORDERED that Easley's motion to amend (ECF No. 23) is
3 GRANTED in PART. It is granted to the extent that Easley seeks to amend her claims under the
4 ADA.

5 IT IS RECOMMENDED that Easley's motion be DENIED to the extent that she seeks to
6 add a claim for intentional interference with prospective economic advantage.
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8 **IV. NOTICE**

9 This report and recommendation is submitted to the United States district judge assigned
10 to this case under 28 U.S.C. § 636(b)(1). A party who objects to this report and recommendation
11 may file a written objection supported by points and authorities within fourteen days of being
12 served with this report and recommendation. Local Rule IB 3-2(a). Failure to file a timely
13 objection may waive the right to appeal the district court's order. *Martinez v. Ylst*, 951 F.2d 1153,
14 1157 (9th Cir. 1991).
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16 DATED: September 9, 2020

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19 BREND A WEKSLER
20 UNITED STATES MAGISTRATE JUDGE
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